PANG CHENG LIM

v.

BONG KIM TECK & ORS

FEDERAL COURT, MELAKA
EUSOFF CHIN CJ
EDGAR JOSEPH JR FCJ
WAN ADNAN ISMAIL FCJ
[CIVIL APPEAL NO: 02-93 OF 1993]
16 AUGUST 1997

LAND LAW: *Adverse possession - Whether defendant could claim title being in occupation for twelve years - Limitation Act 1953, ss. 9(1), 16*

LAND LAW: *Malacca lands - Customary land - Whether first defendant's mother qualified to become customary land-holder - Malacca Lands Customary Rights Ordinance, s. 3(1), (2)(b)*

LAND LAW: *Mortgage - Equitable mortgage- Whether applicable for land held under customary law*

SUCCESSION: *Small estates - Distribution - Whether estate of plaintiff's mother came within definition of Small Estate (Distribution) Act 1955 - Whether Collector of Inland Revenue lacked jurisdiction to hear application for distribution under the Small Estate (Distribution) Act 1955*

The plaintiff had claimed for possession of three lots of land ('the said lands') and for the demolition and removal of buildings erected thereon by the defendants. The 1st defendant claimed that the land was acquired by his mother from the plaintiff's father and consequently counterclaimed for a declaration that the registeration of the plaintiff as proprietor be declared null and void. The trial judge had ruled that although the plaintiff had acquired the indefeasible title being the registered proprietor of the lands, the defendants had been in adverse possession of the lands and as they had been in actual, visible, exclusive and hostile possession for more than twelve years they had created a bar under the Limitation Act 1953. Both the plaintiff's claim and the 1st defendant's counterclaim were dismissed and both appealed against the trial judge's decision.

The plaintiff submitted that the said lands were subject to the Malacca Lands Customary Rights Ordinance ('the Ordinance') and the alleged purchase by the defendant's mother was not valid as she had not obtained any certificate from the Governor-in-Council. It was further contended that the 1st defendant should not be allowed to raise the defence of mortgagee-in-possession as it

was not pleaded. The first defendant's contentions were: (i) the plaintiff's title to the said lands was acquired unlawfully by fraud on the Administration for failing to disclose that the defendants were in occupation of the lands and therefore the title was not indefeasible; (ii) the Collector lacked jurisdiction as the estate was not a small estate under the Small Estate (Distribution) Act 1955 ('the 1955 Act'); and (iii) the title had extinguished and had reverted back to the State.

Held:
Per Wan Adnan Ismail FCJ

[1] The Ordinance had been repealed by the National Land Code (Penang and Malacca Titles) Act 1963 ('the 1963 Act'). Section 108 (1) of the 1963 Act provides that land subject to the Ordinance can not be transferred, leased or transmitted to any person other than a Malay. The proviso to s. 3 of the Ordinance which had allowed transfer of land to non-Malays with the approval of the Governor-in-Council no longer applied.

[1a] The alleged purchase of the land by the 1st defendant's mother was not valid as she had not obtained any certificate from the Governor-in-Council under s. 3(2)(b) of the Ordinance. She was not qualified to become a customary land-holder under s. 3(1) of the Ordinance. As she could not acquire any title under the Ordinance she could not acquire any title by adverse possession however long she and her children had occupied the said lands. They had not acquired any interest at all in the said lands.

[1b] The defendants did not contend that the lands were mortgaged to their mother and the learned judge's finding that the said lands were mortgaged by the deposit of the grants was inconsistent with the pleadings and the evidence.

[2] The defendants had failed to produce evidence on the balance of probabilities that the Collector had breached the relevant provisions of the 1955 Act while performing his official duties in the proceedings for the distribution of the plaintiff's estate. There was no obligation on the part of the Collector under s. 12(6) of the 1955 Act to ascertain who was in actual occupation of the said lands when no alleged purchaser attended the meeting. The plaintiff was not guilty of any fraud and his actions did not come within any provisions of the National Land Code 1965 ('the Code') to defeat indefeasibility.

[3] The Collector was acting within his jurisdiction in the distribution of the plaintiff's mother's estate as the valuation of the said lands by the settlement officer, who was an officer in the office of the Collector, was below RM25,000 which was within the definition of the value of a small estate. The estate was a small estate within the 1955 Act

[4] The plaintiff's mother was the customary land-holder of the said lands and the plaintiff became the registered proprietor of the lands under the Code through the distribution proceedings under the 1955 Act. The fact that the said lands had been occupied by the defendants for a length of time did not extinguish the plaintiff's title and the title to the lands had not reverted to the state. The plaintiff had acquired the indefeasible title to the said lands pursuant to s. 340(1) of the Code and his right had not been barred by s. 9(1) and s. 16 of the Limitation Act 1953. Consequently, the plaintiff was entitled to recover possession of the lands from the defendants.

[5] The defendants were to pull down and remove all buildings erected by them on the land and to deliver possession of the said land to the plaintiff. However, the plaintiff's claim for damages for trespass could not be allowed and the learned judge was right in dismissing the defendant's application for a declaration that the registration of the plaintiff as proprietor of the said land was null and void. The defendants were also not entitled to the claim for compensation under s. 71 of the Contracts Act 1950.

[Plainiff's appeal allowed; defendants' cross-appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG TANAH: *Pemilikan bertentangan - Samada hakmilik boleh dituntut oleh defendan setelah menduduki tanah selama 12 tahun - Akta Penghadan 1953, ss. 9(1), 16*

UNDANG-UNDANG TANAH: *Tanah-tanah Melaka - Tanah adat - Samada ibu defendan layak menjadi pemilik tanah adat - Malacca Lands Customary Rights Ordinance, ss. 3(1), (2)(b)(b)*

UNDANG-UNDANG TANAH: *Gadai-janji - Gadai-janji ekuiti - Samada terpakai kepada tanah yang dipegang di bawah undang-undang adat*

PEWARISAN: *Pesaka kecil - Pembahagian - Samada pesaka ibu plaintiff termasuk dalam takrif Akta Pesaka Kecil (Pembahagian) 1955 (Akta 1955) - Samada Pemungut Hasil Tanah tiada bidangkuasa untuk mendengar permohonan untuk pembahagian di bawah Akta 1955*

Plaintif telah menuntut pemilikan terhadap tiga lot tanah (tanah tersebut) dan kebenaran untuk meroboh dan memindahkan kesemua bangunan yang dibina oleh defendan di atasnya. Defendan pertama menyatakan bahawa tanah tersebut diperolehi oleh emak beliau dari bapa plaintif dan oleh yang demikian menuntut-balas untuk mendapatkan perisytiharan bahawa pendaftaran plaintif sebagai pemilik adalah tak sah dan batal. Hakim perbicaraan memutuskan bahawa walaupun plaintif, sebagai pemilik berdaftar, memperolehi hakmilik tak boleh sangkal kepada tanah tersebut, defendan adalah pemilik bertentangan dan oleh kerana mereka secara nyata memiliki tanah tersebut melebihi dua belas tahun mereka telah menegakkan satu sekatan di bawah Akta Penghadan 1953. Kedua-dua tuntutan plaintif dan tuntutan-balas defendan pertama telah ditolak di mana kedua-duanya merayu terhadap keputusan Hakim perbicaraan.

Plaintif berhujah bahawa tanah tersebut adalah tertakluk kepada Malacca Lands Customary Rights Ordinance (Ordinan tersebut) dan pembelian yang dikatakan telah dibuat oleh ibu defendan adalah tak sah kerana tidak mendapat Sijil dari Governor-in-Council. Dihujahkan lagi bahawa defendan pertama tidak harus dibenar untuk menimbulkan pembelaan pemegang gadai janji-dalam-pemilikan kerana ianya tidak diplid. Hujah defendan pertama adalah (i) hakmilik plaintif kepada tanah tersebut diperoleh secara tak sah kerana berlaku penipuan atau fraud ke atas Pentadbiran bilamana plaintif gagal menjelaskan bahawa tanah tersebut diduduki oleh defendan dan kerana itu hakmilik bukanlah tak boleh disangkal (ii) Pemungut tiada bidangkuasa oleh kerana pesaka berkenaan bukanlah satu pesaka kecil di bawah Akta 1955 dan (iii) hakmilik telah terhapus dan kembali menjadi hak Negeri.

Diputuskan:
Oleh Wan Adnan Ismail HMP:

[1] Ordinan tersebut telah dimansuhkan oleh National Land Code (Penang and Malacca) Act 1963 (Akta 1963). Seksyen 108(1) Akta 1963 memperuntukkan bahawa tanah yang tertakluk kepada Ordinan tersebut tidak boleh di pindahmilik, dipajak ataupun ditukarkan kepada seseorang yang bukan orang Melayu. Proviso kepada s. 3 Ordinan yang membenarkan pindahmilik tanah kepada orang bukan Melayu dengan izin Governor-in-Council tidak lagi terpakai.

[1a] Pembelian tanah yang dikatakan dibuat oleh ibu defendan pertama adalah tak sah oleh kerana beliau tidak mendapat Sijil dari Governor-in-Council di bawah s. 3(2)(b) Ordinan. Beliau adalah tidak layak untuk menjadi pemegang tanah adat dibawah s. 3(1) Ordinan. Oleh kerana beliau tidak mendapat hakmilik di bawah Ordinan beliau juga tidak mendapat apa-apa hakmilik bertentangan tidak kiralah berapa lama sekalipun beliau dan anak-anak beliau menduduki tanah tersebut. Mereka langsung tidak mempunyai apa-apa kepentingan dalam tanah tersebut.

[1b] Defendan tidak menyatakan bahawa tanah tersebut telah digadaikan kepada ibu mereka dan keputusan Hakim perbicaraan bahawa tanah tersebut telah digadai melalui serah-simpan geran adalah bertentangan dengan pliding dan keterangan.

[2] Defendan gagal mengemukakan keterangan atas imbangan kebarangkalian bahawa Pemungut telah melanggari peruntukan Akta 1955 semasa menjalankan tugas resminya dalam prosiding pembahagian pesaka plaintif. Tidak ada keperluan di pihak Pemungut di bawah s. 12(6) Akta 1955 untuk menentukan siapakah yang sebenarnya menduduki tanah tersebut bila orang yang menuntut sebagai pembeli tidak menghadiri mesyuarat. Plaintif tidak melakukan apa-apa fraud dan tindakannya tidak termasuk dalam mana-mana peruntukan Kanun Tanah Negara ('KTN') untuk melenyapkan ketidaksangkalan.

[3] Pemungut bertindak di dalam bidang kuasa bila membuat pembahagian pesaka ibu plaintif oleh kerana nilai pesaka seperti yang dibuat oleh pegawai penilaian adalah kurang dari RM25,000 yang mana termasuk dalam definisi pesaka kecil. Pesaka di sini adalah satu pesaka kecil di bawah Akta 1955

[4] Ibu plaintif adalah seorang pemegang tanah adat bagi tanah tersebut dan plaintif menjadi pemilik berdaftar tanah tersebut di bawah Kanun Tanah Negara melalui prosiding pembahagian di bawah Akta 1955. Fakta bahawa tanah tersebut diduduki oleh defendan untuk suatu jangka masa tidak menghapuskan hakmilik plaintif dan hakmilik tanah tersebut juga tidak kembali kepada Negeri. Plaintif telah mendapat hakmilik tak boleh sangkal tanah tersebut berdasarkan s. 340(1) KTN dan haknya tidak dihalang oleh s. 9(1) dan s. 16 Akta Penghadan. Ianya mengikut bahawa plaintif berhak untuk mendapatkan pemilikan tanah tersebut dari defendan.

[5] Defendan hendaklah meruntuhkan dan memindah kesemua bangunan yang dibangunkan oleh mereka di atas tanah tersebut dan hendaklah menyerah pemilikan tanah tersebut kepada plantif. Bagaimanapun tuntutan plaintif untuk gantirugi kerana pencerobohan tidak boleh dibenarkan dan Hakim yang bijaksana adalah betul bilamana mengenepikan permohonan defendan pertama untuk perisytiharan bahawa pendaftaran plaintiff sebagai pemilik tanah tersebut adalah tak sah dan batal. Defendan juga tidak berhak kepada tuntutan untuk pampasan di bawah s. 71 Akta Kontrak 1950.

[Tuntutan plaintif dibenarkan. Tuntutan-balas defendan ditolak.]

Cases referred to:
Dato' Kamat bin Haji Suleiman v. Sapain binte Mohamed Zin [1938] 7 MLJ 111 ***(refd)***
Mistry Amar Singh v. Kulubya [1963] 3 All ER 499 ***(refd)***
Ismail bin Che Mat [1983] 1 MLJ 385
Ho Sin Tat v. Chang Ah Ngi & Anor [1988] 2 MLJ 629

Legislation referred to:
Contracts Act 1950, s. 71
Evidence Act 1950, s. 114(e)
Limitation Act 1953, ss. 9(1), 16
Malacca Lands Customary Rights Ordinance, s. 3(1), (2)(b)
National Land Code (Penang and Malacca Titles) Act 1963, ss. 104, 105(c), 108(1)(a), (4)
National Land Code 1965, ss. 340, 381
Small Estates (Distribution) Act 1955, s. 8(1), 9(1)

Other sources referred to:
Further And Better Particulars Of Defence And Counterclaim
Evidence, Sarkar, 1993, 14 edn, vol 2, p 1524

[Appeal from High Court Malaya, Melaka; Civil Suit No: 130 of 1979]

For the appellant - Thara Singh Sidhu; M/s Thara Singh Sidhu
For the respondents - Lim Kean Chye (AL Taye & KJ Lai with him); M/s Taye & Co

JUDGMENT

Wan Adnan Ismail FCJ:

This is an appeal against the decision of the High Court at Melaka dismissing the plaintiff's claim for possession of the lands held under Lot 281 (MCL 66), Lot 288 (MCL 67) and Lot 289 (MCL 98) all in the Mukim of Paya Rumput (hereinafter referred to as "the said lands"), for the demolition and removal of the buildings erected thereon, damages for trespass against the defendants, and some other ancillary reliefs. The defendants' (the 1st, 2nd, 4th and 5th) counterclaim for a declaration that the registration of the plaintiff as the proprietor of the said lands is null and void, alternatively for compensation under s. 71 of the Contracts Act 1950 (Act 136) was also dismissed. The defendants cross appealed. The 6th and 7th defendants did not file any defence, while the claim against the 3rd defendant was withdrawn as he had since died.

The Land Held Under MCL 66

The plaintiff became the registered proprietor of this land on 14 January 1978 by the order of the Collector of Land Revenue, Melaka Tengah under the Small Estates (Distribution) Act 1955. Before that the land was registered in

the name of the plaintiff's mother – Oon Leng Ho. On the title was registered a memorial "Subject to Mortg. 180/32". On 20 November 1979 the following memorial was registered on the title:

> Membatalkan Gadaian Jil. 1 Fol. 4 Mortg. No. 180/32 dilepaskan (bayaran dikecualikan oleh Pemungut Hasil Tanah Melaka Tengah).

The Land Held Under MCL 67

The plaintiff became the registered proprietor of this land on 27 June 1977 also by order of the Collector of Land Revenue, Melaka Tengah. The land was also previously registered in the name of the plaintiff's mother. On the title there was no "Subject to mortgage" memorial registered.

The Land Held Under MCL 98

The plaintiff became the registered proprietor of this land on 27 June 1977 also by order of the Collector of Land Revenue, Melaka Tengah. The land was also previously registered in the name of the plaintiff's mother. On the title was registered a memorial "Subject to mortgage 180/32". On 20 November 1979 as in the case of the land held under MCL 66 the following memorial was registered on the title:

> Membatalkan Gadaian Jil. 1 Fol. 4 mortg. No. 180/32 dilepaskan (bayaran dikecualikan oleh Pemungut Hasil Tanah Melaka Tengah).

Proceedings Under The Small Estates (Distribution) Act 1955 (Act 98)

Encik Abdul Wahab bin Abdul Raus (DW3), the Pegawai Penyelia Harta Pesaka Kecil Melaka gave evidence as to the proceedings relating to the estate of the plaintiff's mother in respect of the said lands. He, however, was not the officer who heard the petition for distribution. He gave his evidence based on the contents of the relevant file No. PT M.T. D2/365/76 which he produced in court. He said that from the file he could not find any notice of the enquiry having been given to the defendants. There was however a notice to the plaintiff in encl. (13) and (25). He said that the plaintiff gave evidence at the enquiry. In the evidence there was no mention of any person occupying the said lands. As to the value of the said lands he said the land held under Lot 288 was valued at $3,892, Lot 289 $1,060 and Lot 281 $18,840. The valuation was done by the settlement officer for Melaka Tengah on 27 March 1977 for Lot 288 and 289 and on 15 November 1977 for Lot 281.

When asked about the registered charges he said he could not find the name of the chargee in the file. He could not find any notice having been given to any chargee. Part of his evidence was recorded by the learned judge as follows:

Which enquiry were you referring to when you said there was no notice?

I was referring to notice as to chargee.

What about notice of enquiry?

Notice was issued to Pang and not to the defendants.

As can be seen from the endorsements on the titles of the said lands the hearing of the petition for distribution resulted in the Collector of Land Revenue ordering the said lands to be registered in the name of the plaintiff.

Proceedings for the removal of the memorial "Subject to Mortgage 180/32" on the titles of the lands held under MCL 66 and MCL 98

From the evidence of Encik Abdul Wahab bin Abdul Raus especially that part of the evidence quoted above, it can be assumed without any doubt that an enquiry under Chapter 4 of Part Two of the National Land Code 1965 was held for the removal of the said memorials and as can be seen from the endorsements on the relevant titles, it resulted in the Collector of Land Revenue ordering the memorials to be cancelled.

This enquiry must have been held pursuant to the power of the Collector under s. 381 of the National Land Code which provides as follows:

381. Cancellation of obsolete entries, and bringing of documents of title up to date.

(1) Where the Registrar is satisfied:

(a) that any condition or restriction in interest contained in any document of title has become obsolete, or

(b) that any memorial or entry on any document of title or other instrument relating to land relates to a matter which has ceased to be effective,

he may delete the said condition or restriction or, as the case may be, cancel the said memorial or entry:

Provided that the power conferred by para. (b) is a residual power only, and, where the circumstances in which any particular memorial or other entry may be cancelled are specified in any other provision of this Act, shall not be exercisable in respect of that memorial or entry.

The plaintiff said that his father passed away when he was eight years old and his mother died in 1955. His father was a Baba and his mother a Nyonya Melaka. He remembered staying on the said lands when he was a child but after his father's death he went to stay with his grandmother about four miles

from the said lands. He said before the Japanese Occupation of Malaya he did not see anyone occupying the said lands and throughout Japanese Occupation period he did not visit the said lands at all. He was 18 years old when the Japanese went away. He visited the lands two or three years after the Japanese left. He saw a house on the said lands but did not find out whose house it was. He did not make any enquiries then. When he saw more houses on the said lands he went to the Land Office to make enquiries. It was in 1976. He discovered that the said lands were not in his father's name but in the name of his mother. Later he petitioned to the Collector of Land Revenue for distribution of the estate of his mother comprising the said lands and also applied to remove the charge memorials on the titles of two of the said lands.

The 1st defendant could not remember exactly when he built his house on the said lands but said it was a long time ago. He had stayed in the house for 40 to 50 years. The 2nd, 4th, and 5th defendants were his sons. They also lived there. He said he was asked by his mother to stay on the said lands as she had bought them from one Pang Leong. He built his house when Pang Leong was still living on the said lands. He left after selling the said lands to his mother. He said that his mother told him that Pang Leong came to see his mother and told her that the said lands were mortgaged to a Chetty and that he could not repay the loan. His mother helped Pang Leong by giving money to enable him to pay the Chetty. He did not know how much money was given by his mother. Later Pang Leong came back with the grants to the said lands and gave them to his mother. He asked for more money. His mother gave him about $1,000. The grants that were given to his mother were lost during the Japanese Occupation. He had been paying quit rents and he produced some receipts.

After hearing the parties the learned judge of the court below made this finding on p. 39 of his judgment:

> On the balance of probabilities I hold that the plaintiff had acquired the indefeasible title being the registered proprietor of the lands, pursuant to s. 340(1) of the National Land Code.

As to the 1st defendant's assertion that his mother had paid money to the plaintiff's father, the learned judge made this finding:

> DW1 though his memory was a little weak, was firm that he was in possession of the lands on the strength of his mother having paid money to the plaintiff's father, though the lands were in the name of the plaintiff's mother. Further, he has been paying quit rents from 1956 to 1977 (D2 A-G), (D3 A-H), (D4 A-H) and (D5 A-H). DW2, DW4 and DW5 who are DW1's sons and the 3rd and 6th defendants unrelated to DW1, are staying on the land by virtue of the authority of DW1. Based on the above facts and on the balance of probabilities,

> I hold that they are in lawful possession of the lands and the plaintiff's claim is defeated by adverse possession and limitation.
>
> I hold that that the defendants have been in adverse possession of the lands and, as they have been in actual, visible, exclusive and hostile possession and for more than 12 years, had created a bar under the Limitation Act. I am persuaded to follow the authority of Gunn Chit Tuan J (as he then was) in *Ismail bin Che Mat & Anor* [1983] 1 MLJ 385. See p. 387 F-H for the passages of Rustomji on *Law of Limitation,* which has been quoted earlier.

The learned judge however did not seem to have accepted the evidence of the 1st defendant that his mother had bought the said lands from the plaintiff's father when he said at p. 43:

> I am of the view that DW1's mother had given money to redeem the mortgage to the plaintiff's father, who in turn had deposited the grants which were lost during the Japanese Occupation. Had the plaintiff notified the CLR of the existence of the houses occupied by the defendants, the CLR would have had no other alternative but to refer the matter to the court pursuant to the provisions in Small Estates (Distribution) Act 1955.
>
> I hold that the rights of the 1st, 2nd, 4th and 5th defendants as beneficiaries of the mortgagee in possession had likewise not been extinguished and still subsist further that the plaintiff's right had been barred by s. 9(1) and 16 of the Limitation Act. I have not been sufficiently persuaded to depart from my own decision in *Ho Sin Pat v. Chang Ah Ngi & Anor* [1988] 2 MLJ 629 and [1987] 2 CLJ 162. Unfortunately the appeal against my decision did not materialise due to want of leave to appeal and was accordingly dismissed on 4 May 1987 by the Supreme Court. (SC CA No. 326 of 1986, Seah, Mohamed Azmi and Abdoolcader SCJ).

The learned judge did not say why he could not find as a fact that the 1st defendant's mother had bought the said lands from the plaintiff's father. It was the defendants' case that the plaintiff's father had sold the said lands to the 1st defendant's mother. This was clearly stated in the defendant's *Further And Better Particulars Of Defence And Counterclaim* dated 23 April 1980 supplied to the plaintiff. Paragraph 3(a) of the *Particulars* states as follows:

> 3(a) The plaintiff's father took a loan from a 3rd party and pledged the land as security. When the 3rd party threatened to foreclose on the pledge, the plaintiff's father sold the land to the 1st defendant's mother. The 1st defendant's family thereupon took possession of the land. As the land was Malay Customary Land, no change was made at the Registry.

This was in reply to this question:

(a) What is the meaning "as a result of certain transaction between the plaintiff's father and his mother, the mother became the *de facto* owner of the land?

The plaintiff did not say that the said lands were mortgaged to the 1st defendant's mother. On the evidence and consistent with the pleadings, the learned judge should have held that on the balance of probabilities the 1st defendant's mother had bought the said lands and was given possession of the same by the plaintiff's father.

The said lands were before 1 January 1966 customary lands under the Malacca Lands Customary Rights Ordinance Cap. 125 (hereinafter referred to as "the said Ordinance"). Section 3 of the said Ordinance provides as follows:

3(1) No transfer of customary land shall be valid unless it is made to an individual qualified to become a customary land-holder.

(2) The following persons shall be deemed to be qualified to become customary land-holders:

(a) any Malay domiciled in the State of Malacca; and

(b) any person holding a certificate from the Governer-in-Council of Malacca that he is qualified to hold customary land.

The said Ordinance was repealed by the National Land Code (Penang and Malacca Titles) Act 1963 (hereinafter referred to as "the 1963 Act") which came into force on 1 January 1966. Section 104 of the 1963 Act provides as follows:

104(1) Whenever the State Authority is satisfied that any person who is not a Malay is entitled to or otherwise should be registered as the proprietor of any customary land (otherwise than by way of succession pursuant to s. 105(b) he may issue a certificate to such person, specifying the name of such person and the land in respect of which such certificate is issued.

(2) Whenever any certificated person presents to the Land Administrator any certificate referred to in sub-s. (1) the Land Administrator shall record such person in the appropriate folio of the Malacca Customary Land Register as the proprietor of the land specified therein, and shall endorse such folio in the manner prescribed by s. 105(c).

Section 105(c) requires the title to the land in the Malacca Customary Land Register to be endorsed with the words "Certificated Land".

The plaintiff's mother not being a Malay must have been issued with a certificate under s. 104 in respect of the said lands. Otherwise she would not have been registered as proprietor of the said lands. She was a "certificated

person" under the 1963 Act in respect of the said lands. We notice that only the title of the land under MCL 98 bears the endorsement "CERTIFICATED LAND". We believe it was an inadvertence on the part of the Land Office not to have put the endorsement on the titles of the other two pieces of the said lands. Both these lands were also registered in the name of a non-Malay (the plaintiff's mother). Therefore, the lands must also be "Certificated Lands" under the 1963 Act.

Section 108(1)(a) and (4) of the 1963 Act provides as follows:

> 108(1) Subject to Chapter 3, the following provisions shall apply to land subject to this Part:
>
> (a) no such land may at any time be transferred, leased, transmitted or charged to any person other than a Malay. For this purpose "lease" does not include a tenancy for a term not exceeding three years or a lease for a term exceeding three years but not exceeding thirty years;
>
> (4) Any transfer, lease, transmission or charge contrary to sub-s. (1)(a) shall not be valid for the purpose of registration under this Part and shall not be capable of registration under the National Land Code.

It was the contention of the learned counsel for the plaintiff that as the said lands were subject to the said Ordinance, the alleged purchase of the said lands by the 1st defendant's mother was not valid as she had not obtained any certificate from the Governor-in-Council that she was qualified to hold any customary land.

It was further contended by the learned counsel for the plaintiff that since the coming into force of the 1963 Act the said lands cannot be transferred or charged to any person other than a Malay. The proviso to s. 3 of the said Ordinance (which allowed a transfer to a non-Malay with the approval of the Governor-in-Council) no longer applied. They can only be transferred or charged to the persons mentioned in the Seventh Schedule and Sixth Schedule to the 1963 Act respectively.

The learned counsel for the plaintiff further contended that the defendants should not be allowed to raise the defence of mortgagee in possession as the same was not pleaded. He cited the High Court of Australia case of *Tyson v. Brisbane Market Freight Brokers Pty. Ltd.* [1994] p. 304 as the authority. In any event he contended that as the mortgage was not done in accordance with s. 21 of the said Ordinance, the mortgage was invalid under s. 29 which provides as follows:

> 29. No mortgage or sale of any interest in any customary land in Malacca shall be valid unless made in accordance with this Ordinance.

Therefore, he contended that any submission about equitable mortgage is irrelevant. To support his contention he cited the case of *Dato' Kamat bin Haji Suleiman v. Sapain binte Mohamed Zin* [1938] 7 MLJ 111 in which Horn J stated as follows:

> But the object of this Ordinance is to record the customary right of holders of agricultural land held under customary tenure and the capacity to transfer or mortgage the holder's interest in the land is strictly limited. By s. 4 of the ordinance Conveyancing Law of the Colony is not to apply and if the law does not apply equity which follows the law cannot apply. Section 3 limits the class of holders to domiciled Malays. Under s. 12 transfers and mortgages have to be effected and registered in accordance with the Ordinance and not otherwise. Sections 21 to 28 provide the manner in which the statutory mortgage is to be effected and enforced and s. 29 renders invalid a sale or mortgage not in accordance with the Ordinance. The effect of these sections appears to me to preclude any lien or equitable charge being created by deposit of the Extract from Mukim Register. A customary landholder can only charge his interest in the land in accordance with the Ordinance.

The learned counsel for the defendants contended that the plaintiff's title to the said lands was not indefeasible as he had acquired them unlawfully. A person's title to land is only indefeasible under the National Land Code if he had acquired the same lawfully. It was his contention that the plaintiff had obtained the said lands by committing a fraud on the administration. It was also his contention that the Collector of Land Revenue lacked jurisdiction to hear the plaintiff's petition for distribution of the plaintiff's mother's estate under the Small Estates (Distribution) Act 1955 (hereinafter referred to as "the 1955 Act") as the estate was not a 'small estate' within the meaning of the Act. He also contended that the title to the said lands had been extinguished and therefore the said lands had reverted to the State.

Fraud On The Administration

It was contended that the plaintiff should have disclosed to the Collector of Land Revenue in the proceeding under the 1955 Act of the occupation of the said lands by the defendants. Failure to do so was a fraud on the defendants and on the Land office. As such the proceeding was a nullity.

Fraud was not pleaded. The learned judge in the court below had this to say:

> It is settled law that fraud must not only be pleaded but also particularised in the pleadings. Further, fraud under the National Land Code means actual and not constructive or equitable fraud.
>
> I am in complete agreement with the statement of Syed Agil Barakbah, SCJ in *Lian Keaw Sdn. Bhd. (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. (supra)*:

> In my considered judgment, the transfer of the estate ...
>
> On the basis of what is stated above, I hold that fraud had not been pleaded, nor particularised. What the plaintiff could be guilty of was witholding and or concealing the information of the existence of possession of the lands by the defendants to the CLR at the time of the enquiry. This in my view is not actual fraud. Further the actions of the plaintiff do not come within any of the provisions of s. 340(2) to defeat indefeasibility.
>
> Having held that plaintiff had acquired indefeasible titles to the lands, what remains for me to consider is the question of whether the defendants are in wrongful occupation of the plaintiff's lands.

We agree that that is the correct position in law. However, as the point had been argued we will venture to examine whether there was in fact actual fraud on the part of the plaintiff. To do this we have to examine the provisions of 1955 Act, the Small Estates Distribution Rules 1955 (hereinafter referred to as "the 1955 Rules") and the provisions of the National Land Code 1965 (hereinafter referred to as "the Code").

Under s. 8(1) of the 1955 Act any person claiming to be interested in the estate of any deceased person as "a beneficiary or a creditor or a purchaser" may lodge with the Collector in the prescribed form for the distribution of the estate. The prescribed form is Form A of the First Schedule to the 1955 Rules. In the petition he has to disclose his interest in the estate whether as beneficiary, creditor or purchaser. He has to disclose in the petition the properties of the deceased (both immovable and movable), the debts due to the deceased and the persons and amount of debts the deceased was indebted to and all persons who are entitled to a share in the estate.

Under s. 9(1) the Collector is required to cause notice of the petition and of the date and place of hearing to be served in the prescribed manner upon all persons who are named in the petition as beneficiaries of or claimants to the estate. The prescribed notice in Form D of the First Schedule is in this form:

> NOTICE IS HEREBY GIVEN THAT –
>
> The application will be heard at _____ on the day of ____ 19 at a.m
> All persons claiming to have any interest in the estate of the deceased are required to attend at the time and place abovementioned.
> Any person wishing to object to the petition may lodge a written objection with the Collector before the above date.
>
> Dated the _____ day of _____ 19 _____
>
> _____
>
> Collector.

Section 9(2) requires the Collector to cause notice of the petition and of the date and place of hearing thereof to be published in such manner and at the times and places as may be prescribed. Rule 6(1) of the 1955 Rules prescribes the manner.

Rule 6(1) provides as follows:

> 6(1) Copies of the notice of hearing substantially in the form of Form D **shall be posted at the office of the Collector issuing such notice and also at such places of public resort as the Collector may generally or in particular case direct.** (emphasis is added).

In determining "places of public resort" the Collector will naturally have regard to the provisions of s. 433 of the Code which provides as follows:

> 433. Publication of certain notices and notifications.
>
> Any provision of this Act requiring a copy of a notice or notification affecting land to be published in accordance with the provisions of this section shall be construed as requiring a copy of the notice or notification to be:
>
> (a) affixed in a conspicuous position:
>
> (i) on the land and on the penghulu's office or balai in the area in which the land is situated; and
>
> (ii) in that area, on such court-houses and mosques (if any) and in such markets and other public places (if any) as the State Director thinks fit; and
>
> (b) where the State Authority considers that publication in a newspaper is desirable, published in such newspapers circulating in the State as the State Director thinks fit.

Section 12(6) of the Act provides as follows:

> 12(6) The Collector shall **consider the claims of any alleged purchasers who attend the hearing and shall ascertain and record who, at the date of the hearing, is in actual occupation of any land claimed by an alleged purchaser,** the date, as nearly as the evidence admits, when he went into occupation, and who, at the date of lodging the petition, was in possession of the relevant issue document of title. (emphasis is added).

In our view this section is applicable only when any alleged purchaser of any land comprised in the estate attends the hearing of the petition. It will be applicable in a case when the petition for distribution is lodged by an alleged purchaser or where an alleged purchaser attends the hearing of the petition in response to the notice of hearing in Form D published by the Collector. In the absence of any alleged purchaser at the hearing there is no duty on the

Collector to ascertain who at the date of the hearing is in actual occupation of the land comprised in the estate.

There is in evidence that the plaintiff had lodged the petition for distribution of his mother's estate. There is evidence that the Collector pursuant to such petition had ordered that the said lands be registered in the name of the plaintiff being the beneficiary of the estate. There is no evidence that the Collector had breached any of the provisions of the 1955 Act or the 1955 Rules. There is no evidence that the Collector had not caused the notice of the petition and of the date and place of hearing to be posted at the office of the Collector. There is no evidence that the Collector had not directed that the notice of the petition and of the date and place of hearing be posted at places of public resort which he was mandated to do under r. 6(1) stated above. There is no evidence that he had not directed the notice of the petition and of the date and place of hearing be affixed in a conspicuous position on the said lands and on the Penghulu's office and that the notice was not so affixed.

In the circumstances, the presumption under s. 114(e) of the Evidence Act 1950 is applicable. The s. provides as follows:

> 114. Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) that judicial and official acts have been regularly performed;

Sarkar on Evidence (14th Edition 1993) at p. 1524 Vol. 2 in commenting on the principle and scope of the illustration (e) of the Indian Evidence Act, which is in *pari materia* with ours, says:

> The rule embodied in this illustration is a particular application of the maxim "*omnia praesumuntur rite esse acto*", ie, all acts have been rightly and regularly done. This presumption is chiefly applied to judicial and official acts.

And at p. 1525 of the same volume, it says:

> This presumption is also applied in many cases to the acts of private persons. The foundation for the rule is that every person whether in his private or official character, does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done. So, it is presumed that in the transaction of affairs or business, the persons employed have followed the usual and customary modes of discharge of duties.

And at p. 1526, it says:

> "Regularly performed" means performed with due regard to procedure (*Jagdeo v. Bulaki*, 68 1C 226). "Regularly performed" means performed in accordance with form and procedure. (*Ramakirshna Ganapayya Hegde v. Lakasiminarayanan Timmayya Hegde*, A 1984 Kant 45, 48; [1983] 2 Kant LJ 409).

We agree with the above comments.

The burden is on the defendants to rebut the presumption. They have to produce evidence to prove on the balance of probabilities that the Collector had breached the relevant provisions of the law while performing his official duties in the proceedings for the distribution of the plaintiff's mother's estate. The defendants called DW3 (who was not the officer who heard the petition) to give evidence for the defence but his evidence did not reveal any non-compliance with the relevant laws by the Collector. The officer who heard the petition could have been called. It was the plaintiff's counsel who applied to the learned judge to call the officer but his application was turned down as the plaintiff had already closed his case. But it was still open to the defendants to call him if they wished to. But apparently they did not wish to. They must have been satisfied with just the evidence of DW3 to rebut the presumption.

In our view the defendants had failed to rebut the presumption.

As we said earlier there is no obligation on the part of the Collector under s. 12(6) of the 1955 Act to ascertain who was in actual occupation of the said lands when no alleged purchaser attends at the hearing. The defendants did not attend the hearing though the requirements of the 1955 Act and of the 1955 Rules as to the posting of the petition and of the notice of the date and place and time of hearing of the same had been regularly and properly complied with by the Collector. Therefore, it follows that there was no obligation on the part of the plaintiff to notify the Collector of the occupation of the said lands by the defendants. Further, the plaintiff had always regarded the defendants as tresspassers. We are of the view that the plaintiff was not guilty of any actual fraud.

Lack Of Jurisdiction Of The Collector

From 9 June 1977 a small estate was an estate of a deceased person not exceeding RM25,000 in total value. With effect from 3 June 1977 it was increased to RM50,000.

At the trial in the court below the defendants produced a valuation report of the said lands made by a private valuer (DW2) who valued the said lands as follows:

> Valued as at 1955 – RM22,840
>
> Valued as at 1977 – RM53,443.75

It was the contention of the learned counsel that as the value of the estate in 1977 exceeded RM50,000, the estate was not a small estate and therefore the estate could not be distributed by the Collector under the 1955 Act.

Encik Abdul Wahab b. Raus (DW3) the Penyelia Harta Pesaka Kecil Melaka when asked the value of the said lands said:

> For lot 288 valued at $3,892, Lot 289 – $1,060, Lot 281 – $18,840. The valuation was done by the settlement officer for Melaka Tengah. Date of valuation for lots 288 and 289 on 27 March 1977 and for Lot 281 on 15 November 1977.

Section 4(5) of the 1955 Act provides as follows:

> 4(5) The Collector for each district in which is situated any part of the immovable property comprised in an estate in respect of which a petition for distribution has been lodged shall determine the value of that property, as at the date of lodging the petition, or, if more than one petition has been lodged, as at the date of lodging the earliest petition, and every such valuation shall be conclusive for the purposes of this Act.

The valuation of the said lands by the settlement officer who was an officer in the office of the Collector must have been done at the behest of the Collector who must have accepted the same before he proceeded with the hearing of the petition for the distribution of the plaintiff's mother's estate. The valuation was conclusive.

We are of the view that the Collector was acting within his jurisdiction in the distribution of the plaintiff's mother's estate. The estate was a small estate within the Act.

Adverse Possession And Limitation

We agree with the contention of the learned counsel for the plaintiff that as the said lands were subject to the said Ordinance the alleged purchase of the same by the 1st defendant's mother was not valid as she had not obtained any certificate from the Governor-in-Council under s. 3(2)(b) of the Ordinance. She was not qualified to become a customary land-holder under s. 3(1) of the Ordinance. She was therefore not competent to acquire any title at all to the said lands. If she could not acquire any title under the Ordinance, there could not be any other way by which she could acquire it. To allow her to acquire title by any method not in accordance with the Ordinance would defeat the purpose of the Ordinance. The Ordinance was enacted for the protection of certain classes of people. In the Privy Council case of *Mistry Amar Singh v. Kulubya* [1963] 3 All ER 499, the plaintiff's Mailo land was subject to the Land Transfer Ordinance. Section 2 of the Ordinance provides as follows:

> 2. No non-African or any person acting as his agent shall without the consent in writing of the governor occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the governor) or make any contract to purchase or to take on lease or accept a gift *inter vivos* or a bequest of any such land or of any interest therein other than a security for money: ...

The plaintiff was an African and the defendant an Indian. The plaintiff, the registered owner of the land agreed to lease three plots of the land to the defendant without obtaining the consent made necessary by legislation and allowed him to remain in possession. In an action to recover possession the defendant pleaded illegality. It was held that the plaintiff was entitled to recover possession because his right to possession did not depend on the illegal agreements but rested on his registered ownership of the land and as the defendant could not rely on the agreements because of their illegality the defendant could not justify remaining in possession. It was sufficient for the plaintiff to show that he was the registered proprietor of the plots of land and the defendant as a non-African was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy. Lord Morris of Borth-Y-Gest speaking for the Board said at p. 505 of the report:

> This conclusion is reinforced when the scope and purpose of the legislative provisions are considered. Their lordships agree with the view expressed in the Court of Appeal that the legislation was intended to be for the benefit of Africans as a class. In a case in 1957 the Court of Appeal for Eastern Africa recognised that the object of the Land Transfer Ordinance was to protect Africans by regulating any transfer of Mailo land and by controlling (as a

> matter of public policy) the sale of Mailo land to non-Africans. (See *Motibai Manji v. Khursid Begum (14)*). Section 2 of the Land Transfer Ordinance positively prohibits occupation by a non-African unless the consent in writing of the Governor has been given. A non-African who commits a breach of the provisions of the ordinance becomes guilty of an offence. The circumstance that under the Possession of Land Law an owner of "Mailo" land also commits an offence if, without the approval in writing of the Governor and the Lukiko, he permits "one who is not of the Protectorate" to lease, occupy or use such land does not alter the fact that the purpose of the legislation is to protect Africans and to preserve African land for use by Africans.

Earlier in the report he said:

> The defendant did not have and could not show any right to the property. In view of the terms of the legislative provisions he could not assert that he had acquired any leasehold interest. For the same reason the defendant could not assert that he had any right to occupy. As a non-African he had no right without the consent in writing of the Governor to occupy or enter into possession of the land or to make any contract to take the land on lease.

In our case, the 1st defendant's mother had no right to acquire any title to the said lands because she was not competent to do so by virtue of the provisions of the Ordinance. If she could not acquire any title under the Ordinance, how could she acquire any title by any other method. She therefore could not acquire any title by adverse possession however long she and her children had occupied the said lands. They had not acquired any interest at all in the said lands.

The learned judge said that he was "pursuaded to follow the authority of Gunn Chit Tuan, J (as he then was) in Ismail bin Che Mat [1983] 1 MLJ 385." In that case the learned judge held that the appellant had acquired the land in question by adverse possession. With due respects, the land in question in Penang was not subject to any legislative prohibition. The appellant was competent to acquire the title to the said land by adverse possession. In our case, the said lands are subject to the Ordinance.

The learned judge also said that he had not "been sufficiently persuaded to depart from my own decision in *Ho Sin Tat v. Chang Ah Ngi & Anor*. [1988] 2 MLJ 629." In that case the plaintiff mortgaged his customary land as a security for a loan. The mortgage was registered under s. 22 of the Ordinance. The learned judge held that the defendant's right of mortgagee in possession had not been extinguished. In our case, as we said earlier, it was the defendant's case that their mother had bought the said lands. They never said that the said lands were mortgaged to their mother and we had said earlier that the learned Judge's finding that the said lands were mortgaged by the

deposit of the grants was inconsistent with the pleadings and the evidence. We agree with the learned counsel for the plaintiff that the question of equitable mortgage is irrelevant.

We do not agree with the learned Defence Counsel's further contention that the plaintiff's title to the said lands had been extinguished and the said lands had reverted to the State. The plaintiff's mother was the customary land-holder of the said lands. The plaintiff became registered proprietor of the said lands under the National Land Code through the distribution proceedings under the 1955 Act which we had found to have been properly held. The fact that the said lands had been occupied by the defendants for a length of time did not extinguish the plaintiff's title to the said lands.

We agree with the learned judge that the plaintiff had acquired the indefeasible title to the said lands pursuant to s. 340(1) of the National Land Code. But we do not agree, for the reasons we have stated, with his finding that "the right of 1st, 2nd, 4th and 5th defendants as beneficiaries of the mortgagee in possession had likewise not been extinguished and still subsist further that the plaintiff's right had been barred by s. 9(1) and 16 of the Limitation Act."

We have therefore come to the conclusion that the plaintiff is entitled to recover possession of the said lands from the defendants. We however feel that in the circumstances of the case, the plaintiff's claims for damages for trespass and for account of profits and income should not be allowed.

We agree with the learned judge in dismissing the defendants' claim for a declaration that the registration of the plaintiff as proprietor of the said lands is null and void. There is however the defendants' alternative claim for compensation under s. 71 of the Contract Act 1950 (Act 136).

The section provides as follows:

> 71. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

The learned counsel for the defendants did not make any submission on this point before us. Neither was it mentioned in the written submission. In any event, it is our view that the defendants are not entitled to any compensation under the section in the circumstances of the case.

In the result:

(a) The plaintiff's appeal is allowed with costs here and in the court below. The 1st, 2nd, 4th, 5th, 6th and 7th defendants are to pull down and remove all buildings erected by them on the said lands and to deliver possession of the said lands to plaintiff forthwith.

(b) The defendants' cross-appeal is dismissed.

Reported by Anne Soh

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